NO. 92-1548

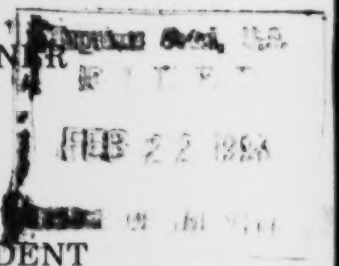
In the Supreme Court of the United States

OCTOBER TERM, 1992

JOHN P. WHITLEY, WARDEN
PETITIONER

VERSUS

ALVIN SCOTT LOYD
RESPONDENT



PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) In light of mitigating evidence, should habeas petitioner's after the fact new psychiatric opinion concerning previously disclosed brain disorder constitute "new evidence" which would warrant habeas relief, particularly in view of State and Federal District Court factual findings to the contrary?

(2) Given statements made to his attorney at the time, should subsequent statements by a death row inmate that are inconsistent, be considered "new evidence" for purposes of determining whether defendant was afforded effective assistance of counsel?

(3) Are statements to a physician which are inconsistent with prior sworn medical testimony, competent evidence on which to rule that there is "new evidence" of mental defect?

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A: STATEMENT OF FACTS

On the evening of April 26, 1981, Tina Giovanetti and her three year old daughter were walking home after attending a fair in Terrebonne Parish. They accepted defendant's offer of a ride in the pick-up truck. When he reached the Giovanetti home, the defendant asked if he could come in. The woman refused his request and stepped out of the truck. Before she could remove her daughter, however, the defendant drove off with the little girl inside the cab. The defendant traveled to the Mississippi River, crossed into St. John the Baptist parish on the Lutcher ferry, and continued down a desolate dirt road near a pipeline. At a remote spot, he raped the child, drowned her in a ditch, carried her body into an adjacent swamp, and covered it with leaves. Ms. Giovanetti reported the kidnapping of her dauther to the police and described the offender and his truck. Armed with this and other information, the St. John the Baptist Parish Police contacted the defendant at his home early the next morning and requested that he accompany them to the sheriff's office. He willingly got dressed and drove his truck to the station house. Interrogation and other events ultimately culminated in the defendant leading the Sheriff to the victim's body and giving a written confession. *State v. Loyd*, 425 So. 2d 721 (La. 1982).

B: STATEMENT OF THE CASE

Alvin Scott Loyd was indicted for First Degree Murder, R. S. 14:30, by a St. John the Baptist Parish Grand Jury. After a bifurcated trial, the jury unanimously found the defendant guilty and recommended the death penalty. On review, the Supreme Court of Louisiana affirmed the conviction but reversed and vacated the sentence because of error in the trial judge's instructions to the Jury, *State v. Loyd*, 459 So. 2d 498 (La. 1984).

Following a new sentencing hearing which began on May 6, 1985, another jury recommended the death penalty, finding the offense was committed in an especially heinous, atrocious or cruel manner and the offender was engaged in the perpetration or attempted perpetration of an aggravated rape and aggravated kidnapping. The Louisiana Supreme Court affirmed this sentence.

Writs of Certiorari were denied by the Louisiana Supreme Court. *State v. Loyd*, 107 S. Ct. 1984, rehearing denied 107 S. Ct. 3244. A state evidentiary hearing was ordered by the Supreme Court. The evidentiary hearing occurred in January, 1988. Based on the findings of the evidentiary hearing, the Court found no basis for the stay of execution. Writs were taken to the Louisiana Supreme Court and were denied. Petitioner having exhausted all state court remedies filed a petition for Post-Conviction Relief, Writ of Habeas Corpus, Request for Evidentiary Hearing and a Stay of Execution with the United States District Court for the Eastern District of Louisiana File Number 89-1389D. On July 27, 1989, the District Court found that none of Petitioner's constitutional rights were violated and denied the relief sought by Loyd. The District Court ordered that Loyd's Stay of Execution remain in effect pending appeal. On appeal, U. S. Fifth Circuit Court of Appeal remanded the matter back to the District Court ruling that the District Court did not give proper deference to the State Court's finding of fact as required by 28 U. S. C. 2254 (d). The District Court reviewed the state habeas court's findings and again held that the performance of counsel was not deficient and did not prejudice Loyd. The U. S. Fifth Circuit Court of Appeal then reversed the Judgment of the District Court and remanded, directing the State of Louisiana, at its own option, to sentence Loyd to life imprisonment or to retry the sentencing phase of his trial. Loyd applied for a re-hearing on the other issues

presented, which rehearing was denied in U. S. Fifth Circuit Court of Appeal on November 23, 1992.

SUMMARY OF ARGUMENT

Please take notice that John P. Whitley, Warden, Louisiana State Penitentiary, Respondent-Appellee in the above-captioned matter (Appellee), through undersigned counsel, hereby petitions the Court for Writ of Certiorari pursuant to Rule 10 of the Supreme Court Rules.

Petitioner requests writs for the reason that the Fifth Circuit reached its decision based on its analysis of "New Testimony and Evidence", most of which is not new, not competent, or both. The only really new matter consists of psychiatric opinion based upon after the fact alleged clinical interviews which flatly contradict appellant's own testimony at the time of the second sentencing trial. To the extent that "new" psychiatric opinion has been formed on the basis of inconsistent clinical interviews and hearsay, the Fifth Circuit would reject the jury function in the sentencing phase and the judicial function in the post-conviction relief phase on the basis of speculation.

The record is quite clear that a number of mitigating factors were presented at the sentencing phase, including evidence of appellant having worked long hours shortly before the crime, having consumed alcoholic beverages, having been physically abused by his father as a child, suffering financial disappointment. In addition, the defense called Dr. Cox who was appellant's treating physician at the Feliciana Facility for four months and who testified to the effects of the various factors or circumstances.

Dr. Cox's opinions were partly based on psychological tests administered while appellant was at

Feliciana. These same tests were provided appellant's new physicians and psychologists for the state evidentiary hearing. While the data was not disputed, the interpretations of data were. The new doctors rendered various opinions based upon the old data, newly interpreted, and their own clinical interviews with appellant. It should also be noted that in at least one instance, significant background information was provided by appellant's habeas counsel. All of the information provided the new doctors, with exception of the Feliciana tests and reports, comes several years after the crime, from sources providing hearsay testimony or first-hand knowledge sheltered from cross-examination so that the reviewing Court cannot discern the inconsistencies.

Regrettably the Fifth Circuit has elected to characterize as "new evidence" testimony which is only new opinion, based on essentially the same information presented to the sentencing jury. In *Harris v. Vasquez,* 949 F 2d 1497 (9th Cir. 1990), cert. denied 112 S. Ct. 1275 (1990), cert. denied 112 S. Ct. 1275 (1992), the appellate court rejected a habeas petitioner's claim that new psychiatric opinion entitled him to habeas corpus relief. In the view of that Court, new psychiatric opinion was not newly discovered evidence warranting relief. The Fifth Circuit seeks to broaden the range of ineffective assistance claims by finding that the *Strickland* tests are not met unless counsel located a psychiatrist or psychologist to testify according to the defendant's wishes. *Roach v. Martin,* 757 F. 2d 1462 (4th Cir. 1985) held that counsel had no affirmative duty to find a psychiatrist who would testify according to defendant's wishes. *Loyd v. Whitley* suggests otherwise.

Additionally, this Honorable Court should consider *Adams v. Aiken,* 965 F. 2d 1306, (4th Cir. 1992), where

a habeas petitioner was found to not have been denied effective assistance of counsel at sentencing, when trial counsel failed to request a mental evaluation during the second trial where the evaluation would have been inconslusive evidence of petitioner's mental condition at the time of the commission of the crime; and *Prejean v. Smith*, 889 F. 2d 1391, cert. denied 110 S. Ct. 1836, 108 L. Ed. 2d 964 (5th Cir. 1989), where defense counsel's alleged failure to present evidence that defendant suffered damage to front and parietal lobes of his brain which rendered him unable to control his violent impulses did not constitute ineffective assistance of counsel in sentencing phase of capital murder prosecution, where trial counsel did present sufficient evidence of defendant's age and mental ability to allow the jury to consider those mitigating circumstances.

Significantly, Drs. Honor and Scanlon relied on Loyd's "self-report", some eight years after the crime, to opine that he could not discern right from wrong at the time of the crime. Neither of these gentlemen were present immediately after appellant was arrested to observe how he led police to the dead child's body. Neither could explain appellant's ability to pass a field sobriety test, carry on a conversation with a police officer and recall it quite well in view of delusions and hallucinations appellant reported to them several years after the crime.

Honor also offered an opinion that appellant was not depressed immediately after the crime but that his symptoms reflected his general psychological state. This is speculation and/or opinion, not evidence. Similarly, there is a suggestion or opinion that Loyd's behavior in murdering the child was the result of organic brain damage. No such definite diagnosis can be made, however.

Certain new opinion testimony is based on information that appellant withheld from his previous attorneys. For example, Randy Lewis testified at the evidentiary hearing that he suspected sexual abuse of appellant but appellant denied it. Dr. Honor claims to have received reports of childhood sexual abuse from appellant, his mother and sister.

Loyd's own version of the day of the crime has apparently become more lucid so that he has related to the new doctors that he consumned as many as twenty-four beers whereas under cross-examination at the sentencing he admitted drinking from eight to eighteen over the day. He could remember detail in his confession but not readily at the sentencing hearing, and then apparently quite well with the new doctors. Loyd related to them, apparently, his intent to kill the child and the notion that he could kill her by raping her.

Finally, the Fifth Circuit has totally ignored the fact that trial counsel hired Dr. C. B. Scrignar to evaluate appellant. Dr. Scrignar's testimony was not presented because it was adverse to appellant's defense. This is when Dr. Cox was called to testify at the sentencing hearing, and reviewed much the same factors that have fueled flights of fancy in the new doctors.

APPLICABLE LAW

A claim of ineffectiveness of counsel is reviewed under the now familiar test of *Strickland v. Washington*, 466 S. U. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984);

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel

> was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This required showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

If defendant challenges a death sentence on ground of ineffective assistance of counsel, defendant must show that there is a reasonble probability that absent counsel's errors, the sentencer, including appellate court to extent that it may weigh evidence, would have concluded that balance of aggravating and mitigating circumstances did not warrant imposition of death sentence. *Whitely v. Bair,* 802 F. 2d 1487 (4th Cir. 1986) cert. denied 107 S. Ct. 1618.

> "If counsel's performance was outside the range of competence demanded of attorneys in criminal cases, the defendant must then establish that any deficiencies in counsel's performance were actually prejudicial to the defense. See *Strickland v. Washington,* 466 U. S. 688 at 691, 104 S. Ct. 2052, 1066-67, 80 L. Ed. 2d 764; "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Such a showing requires the defendant to establish that there is reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. Id. at 694, 104 S. Ct. at 2068. Thus, if a defendant challenges a death sentence such as the one at issue is this case, the defendant must

> show that there is a reasonable probability that absent counsel's errors, the sentencer, including appellate court to the extent if may weigh evidence, would have concluded that the balance of aggravating and mitigating circumstance did not warrant the imposition of a death sentence. Id. at 695, 104 S. Ct. at 2068-69, *State v. Bair,* supra. at 1493.

Federal courts in habeas proceedings are required to grant a presumption of correctness to a state court's explicit findings of fact if supported by the record. 28 U. S. C. 22254 (d). See also *Marshall v. Lonberger,* 459 U. S. 422, 103 S. Ct. 843, 74 L. Ed. 2d 646 (1983); *McCoy v. Lynaugh,* 874 F. 2d 954 (5th Cir. 1989). Although the ultimate question of whether of not counsel's performance was deficient is a mixed question of law and fact, state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of section 2254 (d). *Strickland,* 104 S. Ct. 2070; *Smith v. Estelle,* 711 F. 2d 677 (5th Cir. 1983), cert. denied, 466 U. S. 906, 104 S. C. 1685, 80 L. Ed. 2d 159 (1984).

In reviewing this very case the Fifth Circuit has reasserted the deference which must be afforded the state courts findings of fact, *Loyd v. Smith,* Note 89-3589 p. 3707 U. S. 5th Cir. (April 18, 1990):

> "The Supreme Court, in *Sumner v. Mata,* 449 U. S. 539, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981), has indicated that when a federal court on habeas review disregards a state court's factual findings, the federal court must indicate which statutory circumstance enumerated in section 2254 (d) is present which allows the court to abandon the presumption of correctness. The high degree of deference to state court findings

> required by *Sumner* mandates that a federal court must 'more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even 'fair support' in the record.' *Marshall*, 103 S. Ct. at 850. This high standard stems from the considerations of comity that militate against federal courts reviewing fact findings with a less deferential standard."

THE STATE COURTS FINDINGS OF FACT

The State court in its finding after an extensive evidentiary hearing concluded:

> "Again as stated in *Strickland*, supra. The issue to be decided is whether there is a reasonble probability that at least one of the jurors hearing this evidence "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' It is this Court's opinion that no juror would have so concluded. The enormity of the crime committed was so great that any mental disease or defect, short of legal insanity, would simply not, in this Court's opinion, have tipped the balance in any juror's mind so as not to warrant a sentence of death." (Reasons for Ruling Judgment April 14, 1988)

The State Court evaluated the new psychiatric testimony presented by petitioner and concluded:

> The court acknowledges that the evidence presented at this hearing taken alone, would appear to raise serious questions as to petitioners mental competence, however, petitioner's experts based their opinions on a number of hypothetical

facts which in the Court's opinion were never established. First, the suggestion that petitioner may have been drugged at the bar is simple speculation; second, the record does not show that petitioner had worked unusually long hours in excessive heat, to which he was not accustomed, in the days immediately preceding the crime; and third, there was not evidence to indicate that he had suffered a concussion during the boat ride on the afternoon before the crime. Thus, the opinions of Drs. Honor, Scanlon and Sanchez, to the extent that they were based on these assumptions, would probably have had no influence on the jury's assessment of petitioner's psychological condition on the night of the crime. Similarly, while there was general agreement by the experts that petitioner exhibits clinical signs of some physical irregularity in his frontal lobe brain function, no more than a suspicion was indicated, even by his own experts, that this irregularity explained or excused the crime." (Id. at pp 9-10)

The testimony of Loyd's psychological and psychiatric witnesses presented at the evidentiary hearing on incompetent counsel even if plausible— would not have changed the jury verdict. The State Court concluded:

"THE ENORMITY OF THE CRIME COMMITTED WAS SO GREAT THAT ANY MENTAL DISEASE OR DEFECT, SHORT OF LEGAL INSANITY, WOULD SIMPLY NOT IN THIS COURT'S OPINION, HAVE TIPPED THE BALANCE IN ANY JURORS MIND SO AS TO NOT WARRANT A SENTENCE OF DEATH." (Id. at p. 11)

The state court finding of fact controls unless the court concluded that the state court findings lacked even "fair support" in the record. See *Sumner,* supra. The state court finding of fact are supported by the record in this case.

LEGAL ARGUMENT

The state court in this case was called upon to determine whether there was a "reasonable probability" that had the jury heard the petitioners new psychological evidence presented at the evidentiary hearing, at least one of the jurors would have reached a different verdict. Or as paraphrased in the *Strickland* opinion, can the court be confident that at least one juror's verdict would have not been different had this new evidence been presented. The State District Court Judge assumed the role of a hypothetical juror and, after hearing the additional psychiatric evidence, determined that a sentence of death is proper in this case. The Federal Court's review is limited to determining whether the state court finding lacked even "fair support" in the record. In its treatment of the state court's factual finding, the federal law 28 U. S. C. 2254 (d) establishes a presumption of correctness for "a determination after a hearing on the merits of a factual issue made by a state court of competent jurisdiction in a proceeding to which the application for the writ and the state or an officer or agent thereof were parties, evidenced by reliable finding, written opinion and other reliable and adequate written indicia... See *Marshall v. Lonberger,* 103 S. Ct. 843, 459 U. S. 1314, 74 L. Ed. 2d 924 (1983).

The state district court ruled on the validity of petitioners new psychological evidence and based on the record determined that the hypothetical assumption on which Dr. Scanlon, Dr. Honor and Dr. Sanchez relied were not proven

and therefore not reliable.

It is also important to note that these Doctors examined petitioner seven years after he committed the crime after having spent five years on death row without considering the effect such incarceration had on petitioner's mental state.

The record established more than adequate support for the state court decision that petitioner was not prejudiced. The lack of prejudice is supported by a number of factors.

A) Many of the facts on which Dr. Honor and Dr. Scanlon based their opinions are not supported by the record.

B) Psychological evidence of mitigation was presented by petitioner's counsel.

C) Petitioner withheld critical information from his attorneys.

D) Physical testing did not support Dr. Honor's and Dr. Scanlon's theory of brain disfunction.

A) MANY OF THE FACTS ON WHICH DR. HONOR AND DR. SCANLON BASE THEIR OPINION ARE NOT SUPPORTED BY THE RECORD

When questioned about the factors which caused Mr. Loyd's alleged diminished capacity Dr. Honor and Dr. Scanlon both agree as to the contributing factors:

1) Recent head trauma

2) Alcohol consumption

3) Sleep deprivation

4) Possible drug ingestion

5) Exposure to heat

The testimony of independent fact witnesses does not support the existence of all five factors and seriously challenges the magnitude of others.

Dr. Honor and Dr. Scanlon believe that Loyd suffered a head trauma prior to the murder while riding on a boat. Brenda Goode Carter, who was on the boat, establishes that Loyd did not suffer a head trauma.

QUESTION:"....did he [Loyd] ever fall?"

ANSWER:"No, he didn't fall. " (Second Sentencing trial Transcript p. 252 lines 9-11 Testimony of Brenda Goode Carter)

Dr. Honor's testimony and opinion is based on Loyd's consuming vast amounts of alcohol- in excess of 24 cans of beer-and that this amount of alcohol contributed to Loyd's impairment.

Mr. Albert Poche, Sr. however testified that when Loyd left the camp he was not drunk.

QUESTION:...What condition did he [Loyd] appear to be in when you last saw him?"

ANSWER: "... When he got ready to leave he wasn't drunk or anything like that...but he was pretty lively," (Second Sentencing Trial Testimony-Albert Poche, Sr. p. 200 line 27-28 p. 201 line 1-5)

Mr. Albert Poche, Jr. stated he saw Loyd drink only one beer while at the camp and some wine. (Evidentiary Hearing-January 21, 1988, p. 308 line 20)

While at the bar Loyd consumed an additional beer. (id. p. 224, line 20) He played pool with Poche and Loyd won. Brenda Goode Carter testified that Loyd did not seem intoxicated.

Dr. Honor testified that if the amount of alcohol was around a six pack and not a case of beer it would affect his opinion.

QUESTION: "If the record in this case indicated that Mr. Loyd consumed a six pack of alcohol over the six hour, six hour period of time prior to the crime, would that change your opinion?"

DR. HONOR:

"....Yes. I think it would." (Evidentiary Hear ing Transcript p. 457 line 2-9)

Regarding sleep deprivation and heat exposure the trial record establishes that Loyd worked only eight hours overtime during the entire week ending the day before his trip to Mr. Poche's camp preceding the murder. Loyd slept at home Saturday night and was obviously rested enough to visit his friends camp.

In assessing possible prejudice attributable to not called Dr. Honor and Dr. Scanlon it is important to consider the adverse effects their testimony would generate for petitioner. Consider Dr. Honor's description of Loyd's decision to murder his victim.

DR. HONOR:

"The child is crying. It's at this time that he

> [Loyd] decides that the only way that he can get rid of the threat is by getting rid of the child. And that's the point that which seems that there was an intent to murder the child. And at that point he engaged in those behaviors that were aimed at ridding himself of the child which really embodied the threat at that particular time. (Evidentiary hearing Transcript- p. 407 line 19-27 and p. 408 line 1-3)

Dr. Honor expects the jury to believe that Loyd had trouble making decisions and therefore he should not have been expected to make a good decision when it came to ridding himself of the child.

The record is devoid of any evidence that Loyd was given illegal drugs. When asked by petitioner's lawyer the question Mr. Poche responded:

QUESTION:

> "Do you know whether at the Dulac Bar someone put a drug in Scott Loyd's drink?"

ANSWER:

> "Definitely not." (Evidentiary Hearing Transcript- January 21, 1988, p. 316 line 18-21)

B) EVIDENCE OF MITIGATION WAS PRESENTED

Despite Loyd's assertion to the contrary, psychological evidence of mitigation was presented by his counsel during his sentencing trial. Petitioner's counsel conferred with, subpoenaed and called as a witness at the sentencing trial Dr. Cox, the only psychiatrist that actually treated Loyd. Dr. Cox was also, "the only psychiatrist in Louisiana board certified in Forensic Psychiatry." (Trial Transcript- 1985, p. 214)

Mr. Allison, lead counsel for the petitioner prior to second sentencing trial, conferred with Dr. Cox on the telephone, set a number of appointments with Dr. Cox and consulted with Dr. Cox prior to Dr. Cox's testimony.

ALLISON:

> "In my conversation with Dr. Cox before he testified we talked a whole lot about the impact upon an individual being raised in a home where alcoholism was prevalent. And where a child was subject to being abused by the alcoholic parent and whether that alone could lead to the kind of offense that Alvin had been convicted of ..." (Evidentiary Hearing Transcript- January 20, 1988, p. 50 line 25-27 and p. 51 line 1-7)

Dr. Cox interviewed Loyd more than half a dozen times, not as an examiner for the court or the District Attorney's Office, but as a treating psychiatrist. Equipped with that information, Mr. Allison solicited the following testimony from Dr. Cox to support his case of mitigation.

DR. COX:

> "If Mr. Loyd did in fact commit the offense the probable etiology of the crime was as follows: Mr. Loyd was himself a victim of child abuse and he had a very poor model for adult masculine behavior. He was not able to integrate the antisocial patterns of behavior he learned from his father with the excessively moralistic standards he was taught by his mother. One consequence of this confusion was that he had not obtained a stable adult sexual adjustment. And another consequence was that he developed a pattern of substance abuse. (Trial Transcript- May 9, 1985, p. 204 line 16-26)

"I think there are certain things that child abuse predispose people to do. It can predispose problems with sexual adjustment, yes, sir." (Trial Transcript- May 9, 1985, p. 206 line 4-6)

QUESTION:

"On the day of his crime, the day of the crime his intoxication rendered his inhibitions ineffective. Apparently he committed the crime cognizant of the wrongness of it but unwilling or unable to stop himself." Is, that sentence there, is that consistent with Mr. Loyd's personality and makeup as you understand it?" (Trial Transcript- May 9,. 1985, p. 206 line 19-25)

DR. COX:

"Yes, Sir. That would be consistent." (Trial Transcript- May 9, 1985, p. 206 line 26)

QUESTION:

"Later overwhelmed by horror over his actions he avoided memory of the events." Is that also consistent?" Trial Transcript- May 9, 1985, p. 206 line 27-28)

DR. COX:

"Yes, Sir." (Trial Transcript' May 9, 1985, p. 206 line 29)

QUESTION:

"Doctor, I apologize for the interruption. Let me read that to you, "In general, Mr. Loyd is a gentle and compliant person, he tends to control his anger and hostility. since he does not permit himself to express aggressive behavior," excuse me, "aggressive feelings the danger exists that they might build up to an uncontrollable level and be discharged ex-

plosively. Do you agree with those statements?" (Trial Transcript- May 9, 1985, p. 207 line 11-19)

DR. COX:

"Yes, Sir. As I indicated earlier our observations of Mr. Loyd at the institution were that he was a gentle and compliant person while there. And I think it's true, as with most of us, that if anger builds up there's always a risk that we can explode." (Trial Transcript - May 9, 1985, p. 207 line 20-25)

DR COX:

"I think that abuse of a person as a child predisposes that a person as an adult to be violent, abusive towards others. Either his own children, or other people with whom they might come in contact. I have done many evaluations for the Court. And I have found in I think a very high percentage of people who commit violent acts that they do have a history of abuse as children. That's been my experience." (Trial Transcript - May 9, 1985, p. 208 line 15-23)

QUESTION:

"Mr. Loyd's particular case was there—Excuse me. Let me, let me collect my thoughts here a moment, I'm sorry. In Mr. Loyd's case the history included child abuse and it also included an inability to express his hostility." (Trial Transcript - May 9, 1985, p. 208 line 24-28)

QUESTION:

'Now, what happens to a person who continues to repress and, and close in, hold in these, these emotions?" (Trial Transcript - May 9, 1985, p. 209 line 19-21)

DR. COX:

"Usually trouble occurs. They explode *sometimes and have* an outburst of anger and destructiveness. Sometimes they become depressed. Sometimes they engage in the abuse of drugs and alcohol as a way to try to neutralize or make themselves feel better." (Trial Transcript - May 9, 1985, p. 209 line 22-27)

QUESTION:

"Is it fair to say that a person like this is kind of like a time bomb—?" (Trial Transcript - May 9, 1985, p. 210 line 1-2)

DR. COX:

"Yes, Sir." (Trial Transcript - May 9, 1985, p. 210 line 3)

QUESTION:

"Doctor, in a person like Alvin Scott Loyd who you said was kind of like a time bomb waiting to, to, or I said and you agreed, that he was kind of like a time bomb waiting to go off, what kind of stimulus would trigger his going off, blowing up?" (Trial Transcript - May 9, 1985, p. 212 line 14-18)

DR. COX:

"Different things. Of course, stress, pressure, substance abuse such as alcohol, certain drugs we know predispose people to do things." (Trial Transcript - May 9, 1985, p. 212 line 19-21)

QUESTION:

"Now, if a, if a person has these personality characteristics and then is experiencing this stimulus, whatever it may be, whether it be drugs or alcohol, sleep deprivation, or some

other kind of stress, or combination of those, is it, is he apt to lose his ability to control these impulses?" (Trial Transcript - May 9, 1985, p. 213 line 18-23)

DR. COX:

"It's a possibility, yes, Sir." (Trial Transcript - May 9, 1985, p. 215 line 25)

QUESTION:

"Would that indicate to you then Doctor, that there had to be some kind of extraordinary precipitating cause, something that he didn't meet in the other twenty-five years of his life?" (Trial Transcript - May 9, 1985, p. 215 line 16-29)

DR. COX:

"There had to be something going on that was unusual." (Trial Transcript - May 9, 1985)

In addition to Dr. Cox, Mr. Allison and Mr. Hackman called numerous lay witnesses to establish the following facts to support mitigating circumstances:

1) family background

2) prior physical abuse

3) stress

4) physical exhaustion

5) influence of alcohol

C) APPELLANT WITHHELD INFORMATION FROM HIS ORIGINAL ATTORNEYS

A contributing factor to trial counsel's alleged weak

performance was the fact the petitioner withheld critical information. Petitioner did not provide trial counsel with facts that he now is providing his counsel and experts which diminished their ability to adequately present evidence of psychiatric mitigation. Mr. Lewis, petitioner's counsel, during the first and second trial repeatedly asked petitioner to identify occurrences during his life which would assist counsel.

QUESTION:

> "And during the counsel of your interviews with Mr. Loyd, did you request of him any information which would help mitigate this crime?" (evidentiary Hearing Transcript - January 20, 1988, pp. 204 line 5-8)

MR. LEWIS:

> "We went down through Scotts' past history with him whether he had any prior criminal records. Whether he was honorably or dishonorably discharged from the service. What branch of the service he was in. Whether or not— what kind of home life he had. How he was treated by his parents. Whether he had any, whether he was ever abused as a child. Scotty, I might say doesn't give us very much. We got most of things about Scottys' history from his mother or other relatives." (Evidentiary Hearing p. 215 line 5-17)

QUESTION:

> "Did you request of him any and all information which he could provide you with regard to any childhood abuses which he encountered?" (Evidentiary Hearing Transcript — January 20, 1988, p. 218 line 22-25)

MR. LEWIS:

"Gordon and I both suspected that, you know, inotherwords, we knew that from statistics that people who abuse children are generally as a child have been abused children themselves. So, you know, it was natural for us to make inquiries as to whether or not he had been an abused child. And we did, we did not find anything from any of his relatives or him that indicated that he was a sexually abused child. We did find out that he was an abused child such as, inotherwords his father was an alcoholic. His father beat him. His father would bring him to bars with him and leave him in the car and sometimes give him liquor as a child. We found those things out. And those things were argued to the jury as mitigating circumstances. We did not find any facts from any of the relatives or from Scott himself that indicated that he had been sexually abused as a child which I believe that was my belief. Okay. I believe all along that he, you know, that he must have been sexually abused or something in order to commit that kind of crime. But there was no, nothing that Gordon and I could find from his relatives or his Moma or him, even himself to indicate that." (Evidentiary Hearing p. 219 line 4-27 and p. 220 line 1-8)

QUESTION:

"And you actively sought that type of information?" (Evidentiary Hearing p. 220 line 9-12)

MR. LEWIS:

"Of course." (Evidentiary Hearing p. 220 line 11)

QUESTION:

> "And none of the forthcoming from either the defendant or his family?" (Evidentiary Hearing p. 220 line 12-13)

MR. LEWIS:

> "No" (Evidentiary Hearing Transcript—January 20, 1988, p. 220 line 14)

While counsel has a duty to investigate, that duty is not unlimited. When a defendant gives counsel reason to believe pursuing certain limits of investigation would be fruitless, counsel's failure to pursue these investigations may not later be challenged as unreasonable. *Strickland v. Washington,* supra., *Mulligan v. Kemp,* 771 F. 2d 1436 (11th Cir. 1985), *Tucker v. Kemp,* 776 F. 2d 1487 (11th Cir. 1985), *Whitley v. Blair,* 802 F. 2d 1487 (4th Cir. 1986), *Clanton v. Blair,* 826 F. 2d 1354 (4th Cir. 1987) amd *Gray v. Lucas,* 677 F. 2d 1086 (5th Cir. 1982). Now years after his trial, petitioner asserts evidence of mitigation such as sexual abuse and psychotic episodes which he did not reveal to trial counsel.

Petitioner's case in mitigation at trial failed because his rendition of the factual events were proven false by other witnesses and because petitioner's sketchy description of his alleged psychotic episode was not plausible.

State Court Findings:

The State court in its finding after an extensive evidentiary hearing concluded:

> "Again as stated in *Strickland,* supra, the issue to be decided is whether there is a reasonable probability that at least one of the jurors hearing this evidence "would have concluded that the balance

of aggravating and mitigating circumstances did not warrant death." It is this Court's opinion that no juror would have so concluded. The enormity of the crime committed was so great that any mental disease or defect, short of legal insanity, would simply not, in this Court opinion, have tipped the balance in any jurors mind so as not to warrant a sentence of death." (Reasons for Ruling Judgment, April 14, 1988)

D) PHYSICAL TESTING DID NOT SUPPORT THEORY OF BRAIN DAMAGE OR DISFUNCTION

Both Dr. Honor and Dr. Scanlon indicated that Mr. Loyd may have been suffering organic brain disfunction yet the physical test performed at their request do not support their theory. Conveniently the tests were not completed when Dr. Honor testified but the tests were completed and interpreted prior to Dr. Scanlon's testimony. The test and physical finding did not support a theory of physical brain disfunction.

The transcript of the evidentiary hearing reflects the following:

QUESTION:

> "Doctor, have you obtained any reports or have you requested any physical studies which would suggest to you that or prove to you that Mr. Loyd is suffering from some or from any brain damage?" (Evidentiary Hearing Transcript p. 644 line 19-24)

ANSWER:

> "....There was a electroenecophalogram that was preformed on Mr. Loyd sometimes in the last two weeks. .... I guess that was interpreted as having some non-specific abnormalities to it that were not diagnostic of anything par-

ticular." (Evidentiary Hearing Transcript p. 645 line 5-12)

QUESTION:

"And based on that are you prepared to render an opinion to this Court as to possible brain damage?" (Evidentiary Hearing Transcript p. 646 line 19-21)

ANSWER:

"No, I can say nothing more than the report said that it was a non-specific finding." (Evidentiary Hearing Transcript p. 646 line 23-24)

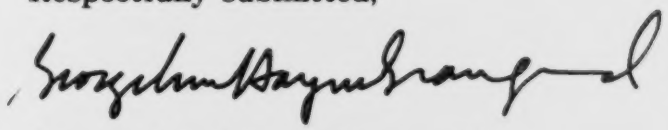
The record reflects that there is no physical evidence of brain disfunction.

CONCLUSION

This Honorable Court should not allow petitioner's current version of the crime, spoon fed to psychiatrists who have evaluated him eight years after the commission of the crime, to replace competent psychiatric and medical examinations done in close proximity to the crime. The events leading up to the commission of the crime, the witnesses who observed Loyd the day and night of the crime, challenge the hypothesis that he was undergoing a psychotic episode. Loyd's description of the crime, his confession, his hiding the body and destroying evidence do not support a finding of mental deficiency sufficient to overcome two jury sentences of death. The appellant should not be allowed to supplant the record of sworn testimony with conjecture and fabrications that have no factual basis.

Considering the apparent conflict among the Courts of Appeal on the questions presented, the State of Louisiana respectfully requests that its Writ Application be granted, and for any and all equitable relief.

Respectfully submitted,



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